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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re S.O., a Person Coming Under the
Juvenile Court Law.

B233662

(Los Angeles County
Super. Ct. No. VJ38899)

THE PEOPLE,

Plaintiff and Respondent,

v.

S.O.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Fumiko Wasserman, Judge. Affirmed as modified with directions.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

The minor, S.O., appeals from May 23, 2011 jurisdiction and disposition orders. The juvenile court found the minor committed: second degree robbery of Claudia Fletes (Pen. Code,¹ § 211), a felony; assault by means likely to produce great bodily injury on Ms. Fletes (§ 245, subd. (a)(1)), a felony; and petty theft from J.C. Penney (§ 484, subd. (a)), a misdemeanor. The minor was placed in a camp community placement program for a period not to exceed six years. We modify the May 23, 2011 jurisdiction order and affirm as modified.

II. THE EVIDENCE AND DISPOSITION

On March 7, 2011, Ms. Fletes, a J.C. Penney loss prevention officer, saw the minor stealing a package of fragrance. Ms. Fletes was working with her manager, Senior Loss Prevention Officer Randall Hastings. The minor picked up the box, removed the sensor, put the box in her purse and exited the store. Ms. Fletes and Mr. Hastings confronted and detained the minor outside the store. The minor resisted. She repeatedly said she knew her rights and she was not going back into the store. The minor backed up against a wall. Mr. Hastings grabbed the minor's purse strap. Mr. Hastings testified: "[S]he just wanted to get away. She was trying to pull away from me."

Thereupon began a protracted series of assaultive acts by the minor. She was flailing her arms around, trying to get Mr. Hastings to release her. The minor tried to push both Mr. Hastings and Ms. Fletes away. Ms. Fletes stepped closer to the minor. The minor spit in Ms. Fletes's face. Mr. Hastings turned the minor around so she was facing the wall. Ms. Fletes took out her handcuffs. But the minor knocked the handcuffs out of Ms. Fletes's hands. Ms. Fletes tried to place the handcuffs on the minor's arm. Then, the minor twice bit Ms. Fletes's left forearm, drawing blood. The minor tried to

¹ All further statutory references are to the Penal Code except where otherwise noted.

kick and push Ms. Fletes away. Ms. Fletes told the minor to let go. The minor then punched Ms. Fletes in the forehead with her fist. Ms. Fletes threw a punch. Ms. Fletes did not remember where the minor was actually struck. The minor said, “Okay, I’m pregnant.” At that point, Ms. Fletes and Mr. Hastings placed the minor on the ground. The minor tried to kick. Ms. Fletes pushed on the minor’s feet to stop the kicking. Mr. Hastings sat on her legs. They finally succeeded in handcuffing the minor. Ms. Fletes found the box of fragrance in the minor’s purse. Mr. Hastings recalled that at some point during the struggle the minor said: “Here take the stuff. I don’t want it. . . . Keep your stuff.”

The minor testified in her own defense. She admitted she stole the perfume. But she said that once she was confronted by Mr. Hastings outside the store, she gave the perfume back to him. She had the perfume in her hand when she started resisting. Her purse slid off her arm and dropped to the ground. Then she became mad and she was not paying attention to the perfume any more. She told Mr. Hastings she was not going back in the store and she tried to walk away. The minor tried to get away from Mr. Hastings and Ms. Fletes. The minor testified she attempted to flee because she did not want to go back inside the store. She wanted to catch up to her friends who were walking towards a bus. Meanwhile, Ms. Fletes and Mr. Hastings continued to attempt to handcuff the minor. But she kept moving so they could not handcuff her. The minor admitted striking and biting Ms. Fletes. When asked if she was biting as hard as she could, the minor admitted, “Yeah.” When she finally sat down on the ground, Mr. Hastings picked up the perfume and put it back in her purse.

The juvenile court sustained the petition. The minor had previously admitted that on May 10, 2010, she committed second degree burglary. (Pen. Code, § 459.) The second degree burglary was charged in a delinquency petition filed on July 12, 2010. The juvenile court declined to aggregate the July 12, 2010 petition. The court aggregated the two felony counts and found that the maximum confinement was 6 years: “So maximum confinement time would be on the petition dated March 9, 2011 count 1 is Penal Code 211 that would be 5, count 2 Penal Code section 245[, subdivision (a)(1)] and

one third the mid is one; those are the only two counts I'm going to aggregate." The juvenile court found the minor was in violation of a December 17, 2009 home on probation order. The juvenile court terminated the home on probation order. The minor was ordered into camp community placement for a maximum period of confinement of six years. The dispositional order makes no reference to the petty theft finding.

III. DISCUSSION

A. Section 654, Subdivision (a)

The minor contends and the Attorney General agrees that section 654, subdivision (a) bars punishment for both the robbery and the assault by means likely to inflict great bodily injury. The concession of the Attorney General is without merit. The minor did not raise this issue in the juvenile court. However, section 654, subdivision (a) issues cannot be forfeited and will be corrected on appeal even if not raised in the juvenile court. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.)

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." It has long been established that: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Section 654, subdivision (a) applies in the juvenile court when, as here, the maximum length of the minor's potential confinement is increased by the aggregation of

her offenses. (*In re Michael B.* (1980) 28 Cal.3d 548, 556, fn. 3; *In re Asean D.* (1993) 14 Cal.App.4th 467, 474; *In re Billy M.* (1983) 139 Cal.App.3d 973, 978-979.)

The juvenile court has broad latitude in determining whether section 654, subdivision (a) applies in a particular case. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We review for substantial evidence the juvenile court's implied factual finding the minor had more than one objective when she committed the present offenses. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Coleman* (1989) 48 Cal.3d 112, 162.) We view the evidence in the light most favorable to the disposition. (*People v. Garcia, supra*, 167 Cal.App.4th at pp. 1564-1565; *People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Substantial evidence supports the juvenile court's implied finding. The juvenile court could reasonably find the minor's assaultive conduct exceeded that necessary to commit the robbery. The juvenile court could reasonably find from the minor's extreme assaultive conduct that she abandoned her desire to take the perfume by force and turned her attention to escaping and avoiding prosecution. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 189-193.) As the Court of Appeal held in *Nguyen*, "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*People v. Nguyen, supra*, 204 Cal.App.3d at p. 191.)

B. Lesser-Included Offense

The minor contends and the Attorney General agrees that the juvenile court's true finding as to petty theft must be reversed because it is a lesser included offense of robbery. In *People v. Estes* (1983) 147 Cal.App.3d 23, 28-29, the Court of Appeal for the First Appellate District held a defendant could not be convicted of both petty theft and robbery. The Court of Appeal reasoned theft is a lesser included offense of robbery. In *Estes*, a Sears, Roebuck & Company security guard, Carl Tatem, saw the defendant steal

merchandise from the store. Mr. Tatem followed the defendant outside the store. Mr. Tatem identified himself. Then Mr. Tatem accused the defendant of leaving the store without paying for the merchandise. The defendant refused to return to the store and began to walk away. Mr. Tatem attempted to detain the defendant. The defendant then assaulted Mr. Tatem with a knife. And defendant threatened to kill Mr. Tatem. Mr. Tatem returned to the store for help. Mr. Tatem returned to the parking lot with the store's security manager, Mel Roberts. The two men then confronted the defendant and asked him to return to the store. The defendant eventually agreed, but denied stealing merchandise or assaulting Mr. Tatem. At trial, the defendant admitted he stole a coat and a vest from the store, but again denied he assaulted anyone. The Court of Appeal held the defendant could not be convicted of both robbery of Mr. Tatem and the lesser included offense of petty theft from the store. (*Id.* at pp. 28-29.) The Court of Appeal reasoned: "The theft of the property from [Mr.] Tatem was also a theft from the Sears store since [Mr.] Tatem, as Sears' agent, was in constructive possession of the merchandise. Therefore, the theft from the store was a lesser included offense to the robbery of [Mr.] Tatem. [Therefore,] . . . we must reverse the conviction for petty theft." (*Id.* at p. 29.) *People v. Villa* (2007) 157 Cal.App.4th 1429, 1435, is to the same effect. Division Eight of the Court of Appeal for this appellate district held the defendant could not be convicted of both robbery of a store employee and petty theft of the store itself. (*Ibid.*; accord, *People v. La Stelley* (1999) 72 Cal.App.4th 1396, 1400-1402.) The present case is indistinguishable. The juvenile court's jurisdictional true finding as to petty theft must be reversed. However, because the true finding as to petty theft did not increase the maximum length of the minor's potential confinement, the disposition order stands as entered.

IV. DISPOSITION

The jurisdictional order is modified to delete the true finding on the petty theft allegation. The juvenile court is to enter a new order finding the petty theft allegation to be not true. The May 23, 2011 dispositional order is affirmed.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.